APPENDIX A.

Opinion and Judgment of the District Court.

United States District Court for the District of Columbia.

Reed Enterprises, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Nos. 1744-65, 2562-65, 3009-65. Consolidated.

OPINION

David Rein, Esquire, of Washington, D.C., for plaintiffs.

Fred M. Vinson, Jr., Assistant Attorney General, C. Westbrook Murphy, Department of Justice, Theodore Kleinman, Department of Justice, David G. Bress, United States Attorney, of counsel, for the defendants.

Before TAMM, Circuit Judge, SIRICA, District Judge, and CORCORAN, District Judge.

CORCORAN, District Judge. The above numbered actions were consolidated since they raise identical constitutional issues for decision by a three-judge panel convened pursuant to 28 U.S.C. §§ 2282-2284.

In each case the plaintiffs originally sought the convocation of a three-judge court to secure injunctive and declaratory relief on grounds that a 1958 amendment to the venue provisions of the Federal Obscenity Statutes violated their constitutional rights.

In each instance the District Judge to whom application for a three-judge court was made denied the application on jurisdictional grounds. The convocation of this three-judge court followed successful appeals by the petitioners to the Court of Appeals. See *Reed En-*

terprises v. Corcoran (*Luros v. Sirica*), 354 F.2d 519 (D.C. Cir. 1965).

The precise issue before the Court is the constitutionality of the venue provision of the Federal Obscenity Statutes[1] as amended in 1958.[2]

I.
BACKGROUND

Title 18 § 1461 defines as nonmailable:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . ."

Prior to 1958 it further provided:

> "Whoever knowingly *deposits for mailing or delivery,* anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." (Emphasis added).

In 1958 for reasons hereinafter recited[3] the immediately foregoing language of § 1461 was amended by deleting "deposits for mailing or delivery" and substituting the phrase "uses the mails" so that the statute now reads in pertinent part:

> "Whoever knowingly *uses the mails* for the mailing, carriage in the mails, or delivery of anything

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[1]18 U.S.C. §§ 1461 and 1462 (1964). While § 1461 (mailing obscene or crime-inciting matter) is of primary concern and will be treated exclusively herein, § 1462 (importation or transportation of obscene matter) is also under attack by plaintiffs. However, because of the similarity of venue provisions any disposition concerning § 1461 will of necessity reflect upon the constitutional status of § 1462.

[2]Pub. L. 85-796, 72 Stat. 962.

[3]Pages 11-14, *infra.*

> declared by this section to be nonmailable . . ." (Emphasis added).

shall be guilty of a violation of the statute.

The intended effect of the 1958 amendment was to place the venue for obscenity prosecution within the purview of Title 18 U.S.C. § 3237 which read:

> "Any offense involving the *use of the mails,* or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted *in any district from, through, or into which such commerce or mail matter moves.*" (Emphasis added).

thus making the use of the mails for the dissemination of obscene matter a continuing offense from the time of deposit to the time of delivery and throughout transit.

The plaintiffs are distributors and publishers of books and magazines which, when considered in the light of the obscenity statute, have been characterized as "borderline or marginal material."[4]

In their original complaint for injunctive and declaratory relief they allege substantially that through application of the foregoing statutory provisions the representatives of the United States intend to and will commence and prosecute various criminal actions in District Courts throughout the United States; that such actions will necessarily involve plaintiffs in a multiplicity of legal proceedings and involve and threaten

[4]So characterized by plaintiffs' counsel during hearing on motion for summary judgment. See also stipulation of facts filed herein listing the several indictments and demonstrating the common theme which the material involved seeks to portray.

them with the destruction of their goodwill and property; that such actions will exhaust their financial and physical resources and thus make it impossible for plaintiffs to adequately defend against the aforesaid multiple criminal prosecutions; that such conduct will seriously diminish the circulation of plaintiffs' books and writings; and that accordingly plaintiffs will suffer substantial and irreparable loss and damage for which plaintiffs have no adequate remedy at law. Further the plaintiffs contend that the 1958 amendment, specifically incorporating a continuous offense doctrine of venue, permits arbitrary forum shopping by Federal prosecutors and the institution of multiple prosecutions for identical material in districts far removed from the residences and places of business of alleged violators. Such permissive forum shopping, it is claimed, constitutes an unlawful interference with and an abridgement and denial of the freedom of the press, in violation of the First Amendment; it deprives persons, including these plaintiffs of their liberty and property without due process of law, in violation of the Fifth Amendment; and finally it depriyes persons of their right to a fair trial in a criminal prosecution guaranteed by the provisions of the Sixth Amendment.[5]

Subsequent to convening this special court the parties stipulated to the pertinent facts underlying this dispute and a hearing was held at which oral argument was presented on cross motions for summary judgment and an alternative motion to dismiss for lack of jurisdiction pressed by the defendant.

In support of their motion for summary judgment the plaintiffs substantially narrowed the constitutional

[5] *Reed Enterprises v. Corcoran*, 354 F.2d 519, 520 (D.C. Cir. 1965).

issue before the Court to whether the provisions of 18 U.S.C. §§ 1461 and 1462 as amended in 1958 are unconstitutional on their face.

The reason for this position is clear. The plaintiffs can allege only a *potential* threat of prosecution in multiple districts and a *potential* objective of depriving them of their constitutional rights where no such activity is shown to exist now nor to have existed in the past since the 1958 amendment. This conclusion is borne out by the stipulated facts which show a total of seven corporations and fifteen individuals, parties plaintiff; and that since 1958 such plaintiffs have been subjected to only four criminal trials under the Federal Obscenity Statute. One case was prosecuted in the home state of the defendant; another originated in Houston, Texas, but was later removed to California,[6] the domicile of the defendant; a third case was conducted in Fort Dodge, Iowa; and the fourth case was tried in Grand Rapids, Michigan in May 1960. On motion by the accused in the Grand Rapids case for a change of venue the District Court upheld the constitutionality of 18 U.S.C. §§ 1461 and 1462.[7] A verdict of guilty and the District Court's ruling on venue were sustained by the Sixth Circuit Court of Appeals.[8]

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[6]Following a deadlocked jury in the Houston trial the case was removed to a California District pursuant to Rule 21b of the Federal Rules of Criminal Procedure.

[7]*United States v. West Coast News Company*, 30 F.R.D. 13 (D.C. W.D.Mich. 1962).

[8]*United States v. West Coast News Company*, 357 F.2d 855 (6th Cir. 1966). Subsequently reversed on other grounds, *sub nom. Aday, et al. v. United States*, 388 U.S. 447 (1967). On this same day the Supreme Court granted certiorari and summarily reversed twelve other obscenity cases which were pending before it by mere reference to *Redrup v. N.Y.*, 386 U. S. 767 (1967). In *Redrup* the Supreme Court reviewed the diversity

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No criminal case involving these plaintiffs (or others) has been brought in this District in the past and no case involving these plaintiffs (or others) is now pending before this or any other court in this District.[9]

This historical record would seemingly justify a court in refusing to consider a challenge to the constitutionality of a statute as it might apply to a hypothetical situation. *Virginian Ry. Co. v. System Federation,* 300 U.S. 515 (1937); *Blackmer v. United States,* 284 U.S. 421, 442 (1932); *Jeffrey Mfg. Co. v. Blagg,* 235 U.S. 571, 576 (1914).[10]

This traditional concept of justiciability, however, must be subordinated in reaching the merits of the case under the developing standards of prior restraints upon First Amendment rights. See *Speiser v. Randall,* 357 U.S. 513 (1958); *Smith v. California,* 361 U.S. 147 (1959); *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *NAACP v. Button,* 371 U.S. 415 (1963); *Reed Enterprises v. Corcoran, supra.*

II.

THE CONSTITUTIONAL ASPECTS OF VENUE

It should be initially noted that the Federal Obscenity Statutes with which we are here concerned are founded on the powers of Congress to exclude objectionable

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of opinion prevailing among members of the Court, as to what constitutes unprotected expression but found that no matter what test was applied the material before the Court was constitutionally protected.

[9]This was one of the jurisdictional grounds upon which the convening of a three-judge panel was originally denied.

[10]See references in similar context in *United States v. Frew,* 187 F. Supp. 500 at 507 (D.C. E.D. Mich., 1960) and *United States v. Wurzbach,* 280 U.S. 396, 399 (1930).

and non-constitutionally protected material from the mails. That Congress has the power to regulate the mails is well established, *Public Clearing House v. Coyne,* 194 U.S. 497 (1904). It is likewise well established that obscene, lewd, lascivious, etc. material is not constitutionally protected by the First Amendment, or any other constitutional safeguard. See *Roth v. United States,* 354 U.S. 476 (1957); *Jacobellis v. Ohio,* 378 U.S. 184 (1964); *Ginzburg v. United States,* 383 U.S. 463 (1966).

We approach the specific problem with those general concepts in mind.

Article III, § 2, Clause 3 of the Constitution reads in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; . . ."

The Sixth Amendment to the Constitution similarly provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."

Neither the Constitution nor any principle of constitutional law entitles an accused to be tried in the place of his residence or domicile. If a crime has been committed against the United States the Constitution only requires that trial be conducted in a district where the crime was committed. *Haas v. Henkel,* 216 U.S. 462, 473-474 (1910).

Most Federal crimes involve some aspect of interstate or foreign commerce and usually involve multiple state or district contacts. The Federal offense may be committed partly in one state and completed in another, or it may be what is denominated a continuing offense, such as an offense involving the unauthorized use of the mails or otherwise transporting prohibited goods in interstate commerce.

Congress must accordingly determine where venue will lie for purposes of Federal jurisdiction under any given statute.[11] Silence on the part of Congress in any instance would only lead to chaos.

Thus in the enactment of the Elkins Act, 49 U.S.C. §§ 41-43 (1964), prohibiting transportation of goods in interstate commerce at rates less than those prescribed by regulated tariffs, Congress saw fit to include a venue provision to the effect that prosecution could be had in any district "in which such violation was committed or through which the transportation may have been conducted." The Supreme Court specifically upheld the concept of the continuing offense as a basis for determining venue (*Armour v. United States*, 209 U.S. 56 (1908).)[12] The Court commented (at p. 74) that "[W]hen it [the violation] takes place, whether in one district or another, whether at the beginning, at the end, or in the middle of the journey,

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[11]"The problem of laying and justifying venue in such cases has been severe and recurring." *Comment—Multi-Venue and the Obscenity Statutes*, 115 U. Pa. L. Rev. 399 (1967), citing Abrams *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L.Rev. 751 (1962).

[12]This case also involved the most extreme aspects of this concept in terms of traditional notions of fair play and substantial justice—that of the intervening district venue.

it is equally and at all times committed." (Emphasis added).

The Court met head-on the objection of alleged serious hardship implicit in prosecutions in places distant from the home and remote from the vicinage of the accused by characterizing it as an "objection to the policy of the law, not the power of Congress to pass it. *Hyde v. Shine*, 199 U.S. 62, 78." *Armour Packing Co. v. United States, Id.* at 77.

But while the Supreme Court, in line with *Armour*, has not attacked the constitutional power of Congress to use the continuing offense concept, it has required a showing of a clear Congressional intent prior to applying the concept and has otherwise limited the choice of venue.

Thus in *United States v. Johnson*, 323 U.S. 273 (1944) the Court was called upon to construe the venue provision of the Federal Denture Act, 18 U.S.C. § 1821 (1964) which provided for prosecution for "sending" dentures through the mail. The Court seized upon what it considered the absence of a clear intent and restricted venue to the point where the dentures were actually deposited in the mail notwithstanding the existence of a general venue statute which would have permitted prosecution in another jurisdiction.

The holding of the Court in *United States v. Johnson* has been attributed to the distaste felt for the continuing offense concept; ". . . the Court was straining to find ambiguity in this particular statute . . ." (115 U. Pa. L. Rev. 399 at 418 (1967). But for all such distaste the Court never disputed the power of Congress to provide specifically for venue, stating, at page 275:

> "By utilizing the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates. *Thus, an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district.*" (Emphasis added).

Because of possible hardship which such leeway engenders, leading to "appearance of abuses, if not to actual abuses, in the selection of what may be deemed a tribunal favorable to the prosecution" the Court required in *Johnson* and subsequent cases[18] a clear Congressional mandate. In *Johnson* Justice Frankfurter, speaking for the Court, recognized that such venue questions must be regarded as more than mere procedural matters and raise deep issues of policy considerations which "touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests." *United States v. Johnson, supra* at 276. *Accord, Travis v. United States,* 364 U.S. 631 (1961).

Following the *Johnson* decision, and having in mind the judicial restriction of clear intent there announced, Congress responded in 1948 by amending 18 U.S.C. §3237 to read as quoted on page 3.

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[18]U.S. v. Anderson, 328 U.S. 699 (1946). Where Congress is not explicit "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." at 703; *accord, Travis v. United States,* 364 U.S. 631 (1961) But where Congressional intent is specific, matters of possible hardship of trial away from the vicinage of the accused "neither allows nor requires judicial changes in the law of venue." *Johnston v. United States,* 351 U.S. 215 (1956).

The amendment was intended to remove all doubt as to the venue of continuing offenses and make a special venue provision unnecessary except in those cases where Congress wished to restrict the prosecution of offenses to a particular district. Offenses involving use of the mails and transportation in interstate commerce were clearly designated as continuing offenses.[14]

Notwithstanding the 1948 amendments, which seemingly resolved all ambiguity in cases involving use of the mails, the Tenth Circuit in 1953 in the case of *United States v. Ross* (205 F.2d 619 (1953) refused to apply the continuing venue concept to language in the then obscenity statute which proscribed the "knowing deposit for mailing or delivery of nonmailable material."

Ross held in effect that "deposit" was the key word in the obscenity statute which precluded the application of the continuing offense doctrine.

The practical result of *Ross* was that prosecution of Federal obscenity cases was thereafter largely confined to the major publishing centers of Los Angeles and New York. The character of material shipped country-wide was being determined in those allegedly liberal jurisdictions with attendant difficulties to successful prosecution. *Comment, Venue: Impact on Obscenity*, 11 So.D. L.Rev. 363 (1966) relying upon Lockhart and McClure, *Censorship of Obscenity: The Development of Constitutional Standards*, 45 Minn. L.Rev. 5, 36 (1960); see also Senate Report No. 1839, 85th Cong., 3 (1958).[15]

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[14]See notes following 18 U.S.C. § 3237 (1964), citing 80th Congress House Report No. 304.

[15]These problems were presented to the Congress during Hearings on Mailing of Obscene Matter before Subcommittee

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The *Ross* roadblock to successful prosecution of obscenity cases led Congress to enact the 1958 amendments to the Obscenity Statute. The legislative history of those amendments leaves no doubt that what Congress was trying to do was to supply the specificity of intent required by the *Johnson* case and to avoid the impact of the *Ross* case.[16]

The House of Representatives initially passed a bill which provided for continuing offense language requested by the Post Office Department (House Report No. 2624). The Senate Bill limited prosecution to the place of deposit and place of receipt.[17] (Senate Report No. 1839, 85th Cong., 2d Sess. 3 (1958)). The disagreement was resolved in Conference where the House version was adopted.

The Conference Report contained the following summary:

> "It is the position of the Post Office Department that the crime of sending obscene matter through the mails is a *continuing crime* from the point of deposit, in transit, and at the point of

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No. 1 of the House Committee on the Judiciary, 85th Cong., 2d Sess. 8 (1958) in the following terms:

> "Difficulties in prosecuting violators resulting from liberal attitudes of courts and juries—particularly in certain metropolitan areas, notably Los Angeles and New York—have established virtual sanctuaries allowing dealers in publications devoted exclusively to distorted sex to operate in defiance of the Post Office Department's best effort to bar their use of the mails or bring them to justice."

[16]See summary of legislative history in *United States v. West Coast News Co.*, 30 F.R.D. 13 at 18-19 (1962).

[17]The Senate originally took what it considered the "middle view" between *Ross* and the House passed bill on the ground that it considered that unrestricted "forum shopping" could lead to abuses and is therefore against public policy. But even the Senate recognized the need for expansion of venue and was initially willing to authorize limited "forum shopping."

delivery. The House concurred in the position of the Post Office Department. However, it appears that the Senate amendment of the venue provision would destroy the nature of the continuing offense. Furthermore, the striking out of the provision for the prosecution of the offense in the jurisdiction through which the obscene matter passes is contrary to the intent of Congress as expressed by the law in section 3237 of title 18, United States Code." (Emphasis in original). Statement of the Managers on the part of the House accompanying H.R. 6239 (House Report No. 2624 at page 3, 85th Cong., 2d Sess. (1958)).

More pointedly, it was said in debate:[18]

"The interpretation given by the courts has, to all intents and purposes, nullified previous congressional action. They have said a promoter can be prosecuted only where he puts the material into the mail. As a result the community most affected by the crime, that is, the one where the stuff is circulated, has no opportunity whatsoever to protect itself.

"The bill before us, is intended to overcome the effect of judicial interpretation and thereby to increase materially the effectiveness of the present statute. Its purpose is to make it abundantly clear that violators can be prosecuted either at the place of mailing, or at the place of address or delivery, or in any judicial district through which the objectionable matter is carried in the mails.

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[18]Congressional Record, Vol. 104, No. 78, pp. 8043-8046, May 19, 1958.

> "There is nothing for anyone to fear in the enactment of this legislation except those who seek profit from pornography and immorality. Merely to permit the moral, God-fearing members of the community to pass judgment upon purveyors of filth who would destroy the homes of a community and the morals of the juveniles who reside therein, should strike fear in no one's heart other than those who fear justice and the loss of degrading profit in human misery."

From the foregoing it can readily be seen that the concept of continuing offense is not an innovation; rather it is an aged concept which has been upheld by the Supreme Court in several cases. It is undisputed that the Congress, having the power to control the use of the mails, has unequivocally manifested its intent that obscene material be excluded from the mail and other agencies of interstate commerce. And, while the Supreme Court has noted issues of public policy, possible hardship and burden[19] in considering questions of venue, it has never questioned the power of Congress to designate proscribed offenses as continuing offenses by regulation of the use of agencies of interstate commerce.[20]

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[19]The plaintiffs' allegations of hardship must also be considered in light of the availability of an effective remedy in Rule 21b of the Federal Rules of Criminal Procedure. This rule was designed specifically for the purpose of alleviating unnecessary hardship and provides for a change of venue when in the discretion of the judge such a change would be in the interests of justice.

[20]As stated by Mr. Justice Douglas speaking for the majority in *Travis v. United States:* "The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used" 364 U.S. 631 at 634 (1961).

While these concepts of venue as developed have been criticized, even critics have conceded that "the continuing offense concept has become securely engrained in the administration of federal criminal law and the constitutionality of the concept itself, as opposed to its application in a particular area of criminal law, would appear to be no longer open to attack." 115 U.Pa. L.Rev. 399 at 423 (relying in substantial part on Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 U.C.L.A. L.Rev. 751 at 816).

On the basis of the foregoing this Court must conclude (as has every court which has had occasion to consider the question similarly concluded)[21] that the use of the mails for transporting obscene material clearly constitutes an activity which Congress may constitutionally designate a continuing offense and that such designation does not violate the Sixth Amendment venue provision of the Constitution.[22]

III.

PRIOR RESTRAINT AND DUE PROCESS

We consider now the plaintiffs' contentions that the venue provisions constitute a "prior restraint" upon freedom of expression in violation of the First Amend-

[21] *United States v. West Coast News Co., supra*, reversed on other grounds, 388 U.S. 447 (1967); *U.S. v. Luros*, 243 F. Supp. 160, 167-168; *U.S. v. Frew*, 187 F. Supp. 500 (E.D. Mich. 1960); *Toscano v. Olesen*, 184 F. Supp. 296 (S.D. Calif. 1960). See also *U.S. v. Sorce*, 308 F.2d 299 (4th Cir. 1962) where the court sustained a similar venue provision of the Mail Fraud statute (18 U.S.C. 1341).

[22] The Court finds no necessity to bolster this conclusion by reference to affidavits, submitted by the Government, that it is the stated policy of the incumbent Attorney General not to invoke *in transitu* jurisdiction. Constitutional considerations need a more solid basis than variable policy.

ment as well as violating the due process requirements of the Fifth Amendment. The substance of the plaintiffs' claim is that the existence and potential use of the power to select venue in criminal obscenity prosecutions has an *in terrorem* effect which may intimidate people from exercising First Amendment rights, thus depriving the public of access to protected publications. More particularly the plaintiffs argue that it is difficult at best to defend in the field of obscenity where the standards and concepts are vague, but when additionally a publisher or distributor of publications is required to meet not only the economic challenge of defense away from home, but as well the uncertainty that is implicit when juries in varying jurisdictions are required to define what is obscene, the combination of burdens and vagueness necessarily results in an unconstitutional restraint upon the activities of the publishers or distributors. This combination of factors, it is urged, could well induce a person to engage in self-censorship and thus restrict the public's access to protected publications.

The strict standards by which statutes affecting First Amendment rights must be measured have been set forth in numerous cases decided by the Supreme Court within the last ten years, many of which are relied upon by the plaintiffs to sustain their position.[23] And it is apparent from some of those cases that the Supreme Court, when confronted with statutes regu-

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[23] *Speiser v. Randall*, 357 U.S. 513 (1958); *Smith v. California*, 361 U.S. 147 (1959); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58 (1963), *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Dombrowski v. Pfister*, 380 U.S. 79 (1965).

lating expression and involving possible imponderables that may inhibit the full exercise of First Amendment freedoms, has relaxed some of the procedural prerequisites to the assumption of jurisdiction. *Smith v. California,* 361 U.S. 147 (1959). Under certain limited conditions the mere threat of criminal prosecution or other sanctions by the Government without necessary safeguards for exercise of a First Amendment freedom has been sufficient to justify court intervention especially when the statute has presented a potential "chilling effect" on protected expression. *NAACP v. Button,* 371 U.S. 415 (1963); *Dombrowski v. Pfister,* 380 U.S. 479 (1965), *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). See also *Reed v. Corcoran, supra.*

However, rights guaranteed by the First Amendment like all individual rights, are not absolute and all legislative enactments which touch upon First Amendment rights or have some ancillary effect upon free expression need not be and have not been declared unconstitutionally void. This is especially true, as the Supreme Court noted in *Speiser v. Randall,* where there is "no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern." 357 U.S. at 527. See also *United States v. Harriss,* 347 U.S. 612 (1954). This principle was relied upon in *Roth v. United States,* 354 U.S. 476 at 484 (1957), when the Court stated:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, *unless excludable because they encroach upon the limited area of more important interests.*" (Emphasis added).

This Court, of course, must closely and carefully scrutinize procedural safeguards especially "[W]hen we deal with the complex of strands in the web of freedoms which make up free speech." (*Speiser v. Randall,* 357 U.S. 513, 520-526 (1958)). It is fully cognizant of the fact that it is dealing with a limited and uncertain area of permissible Government activity and that the Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant,* 367 U.S. 717-731 (1961).

However, while many of the cases cited by plaintiffs provide some guidance in the application of a constitutional standard, of themselves they are not controlling in the disposition of the present case.

In the first place we are not confronted here with any direct "prior restraint" upon free speech or any procedure restraining dissemination of materials prior to a judicial determination of their constitutional status. The application of the venue statute obviously occurs only after dissemination. And as to the indirect threat of prosecution which is implicit in any criminal statute, it, of course, is a purely subjective matter—what one man would consider a threat may not be a threat to another. Certainly there is no basis for a conclusion that the threat of criminal prosecution is materially increased merely because the prosecution may be brought in one of several districts.

Accordingly we cannot conclude that the "threat" of prosecution of any defendant is any greater since passage of the 1958 amendment than that "threat" may have been before enactment. It can only be hypoth-

esized that the chances of successful prosecution at the trial level may be somewhat more favorable to the Government if it has a choice of venue. But in that connection it must be noted that we are dealing with a *uniform* and constitutionally sufficient standard of what constitutes obscenity in a particular case, and while the criteria are uniform, uniformity of result cannot be guaranteed. (*Roth v. United States,* 354 U.S. 476 (1957)).

Prior to the enactment of the multi-venue provisions the Supreme Court upheld the constitutionality of the Federal Obscenity Statute in *Roth, supra,* (*Albert v. California*). In *Roth* the issue was specifically whether the Federal obscenity statute violated the First, Fifth, Ninth and Tenth Amendments. The Court held that obscenity is not within a constitutionally protected area. Accordingly the Federal statutes when applied "according to the proper standard for judging obscenity do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." (*Roth, supra,* at 492).

In *Roth* and in subsequent decisions dealing with attempts to define and establish obscenity standards[24] the Supreme Court has recognized that inevitably, all criminal statutes have some deterrent effect, and criminal statutes regulating constitutionally unprotected expression are no exception. The " 'Constitution does not

[24]Mr. Chief Justice Warren described the problem of what constitutes obscenity as "increasingly muddled and difficult for the federal and state courts and legislators to understand since we first defined the reach of the First Amendment in this area in *Roth v. United States,* 354 U.S. 476 (1957)" *Jacobs v. New York,* 388 U.S. 431 at 434 (1967). (Dissenting opinion).

require impossible standards'; all that is required is that the [statutory] language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . .'" * * * "'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . .'" *Roth, supra,* at 491-492, quoting from *United States v. Petrillo,* 332 U.S. 1, 7. The *Roth* opinion further notes that:

> ". . . [I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." (At 492 note 30).

It was the concern of the Supreme Court for protecting the fundamental freedoms of speech and press and the possibility of encroachment that led it to find that it was "vital that the standards for judging obscenity safeguard . . . material which does not treat sex in a manner appealing to prurient interest." *Roth, Id.* at 488. Correspondingly the Court noted that "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the *universal judgment that obscenity should be restrained,* . . ." *Id.* at 484-485. (Emphasis added).

In light of the undisputed and unavoidable ancillary effect which any criminal statute has upon proscribed conduct or expression this Court agrees with the Government's characterization that the appropriate question is not whether 18 U.S.C. §§ 1461 and 1462, as amended, induce self-censorship but rather whether the

1958 venue amendment increased the existing pressures toward self-censorship to a constitutionally unacceptable degree.

Considering the Supreme Court's ruling in *Roth* that the obscenity standards are constitutionally sufficient to protect a person and place him on notice that a crime is being committed; and recognizing that such standards are uniformly applied; and believing that if a publisher is going to feel restrained, it will be out of fear of *any* prosecution rather than fear of prosecution in other than his home district, this Court must conclude that the venue amendments are constitutional on their face.

Any increase in apprehension which may accrue on a purely subjective basis by reason of the injection of a multi-venue provision is at most ancillary and *de minimus*. Such apprehension is only a concomitant of any criminal law and is susceptible to being raised regardless of the existence of multiple venue provisions.

As one court, which has also sustained this same venue provision noted:

> "One who chooses to carry on an enterprise which might indeed offend criminal statutes enforceable in places in which he proposes to carry on his enterprise, must take the hazards involved. *U.S. v. Wurzbach,* 280 U.S. 396, 399. It is not the duty of the court in enforcing the law or of Congress in enacting statutes to advise in advance the likely reaction of juries in each community in which an individual chooses to carry on his activities." *U.S. v. Frew,* 187 F. Supp. 500, 507 (E.D. Mich., 1960); also quoted in *U.S. v. West Coast News Company,* 30 F.R.D. 13 at 21 (1962).

The plaintiffs rely heavily upon *Jacobellis v. Ohio,* 378 U.S. 184 (1964) to discredit the multiple venue provision. The gist of their argument is that when Congress enacted the 1958 venue amendments it did so with the specific intent of causing obscenity to be litigated in the communities where the impact of the alleged obscenity was felt—that is, according to the local community standard—but that *Jacobellis* creates a national standard so that legislation enacted with a view to applying a local standard is of necessity unconstitutional. But this conclusion is not warranted under the present state of the law.[25] The question of national versus community or other standards has not yet been determined,[26] and particularly as concerns venue the Supreme Court itself has noted that the 1958 amendments have no effect on determining the community standards to be apply [sic.] in obscenity cases. *Manual Enterprises v. Day,* 370 U.S. at 488 (n. 10). Accordingly it would seem that the plaintiffs have placed undue reliance on the *Jacobellis* decision, and certainly they have not demonstrated the unconstitutional purposes of the 1958 amendments through their interpretation of that case. The Court accordingly rejects this contention.[27]

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[25]While the court has on occasion made reference to a national contemporary community standard as opposed to a local contemporary community standard, a majority of the court has never agreed with this proposition. See *Manual Enterprises v. Day,* 370 U.S. 478 (1962); *Jacobellis v. Ohio, supra.*

[26]See petition for certiorari filed 6/28/67 in Case No. 430, *K. I. Distributors v. New York* (36 LW 3102) where the question of contemporary community standards is specifically raised.

[27]The argument advanced by plaintiffs is but another challenge to the vagueness in the existing manner of determining when material falls outside of protected expression. This we have already considered and rejected as grounds for attack upon this statute.

It not being necessary to this decision, this Court will not embroil itself in a discussion of the variable as opposed to the constant concept of obscenity as most recently enunciated in *Ginzburg v. United States*, 383 U.S. 463 (1966). See also, Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L.Rev. 5 (1960).

The motion of the defendants for summary judgment is granted. The plaintiffs' motion for summary judgment and the defendants' motion to dismiss are denied. It is so ordered.

/s/ EDWARD A. TAMM
Edward A. Tamm
United States Circuit Judge

/s/ JOHN J. SIRICA
John J. Sirica
United States District Judge

/s/ HOWARD F. CORCORAN
Howard F. Corcoran
United States District Judge

Dated: October 26, 1967.

APPENDIX B.

Opinion of the Court of Appeals on Mandamus.

United States Court of Appeals, for the District of Columbia Circuit.

Reed Enterprises, *et al.*, Petitioners v. The Honorable Howard F. Corcoran, Judge of the United States District Court for the District of Columbia, Respondent. No. 19,677.

Milton Luros, *et al.*, Petitioners v. The Honorable John J. Sirica, Judge of the United States District Court for the District of Columbia, Respondent. No. 19,722.

On Petitions for Writs of Mandamus.

Decided December 2, 1965.

Mr. David Rein for petitioners.

Mr. Frank Q. Nebeker, Assistant United States Attorney, with whom *Messrs. John C. Conliff, Jr.*, United States Attorney at the time of argument, and *Jerome Nelson,* Assistant United States Attorney, were on the pleadings, for respondents.

Before Fahy, Wright and Leventhal, *Circuit Judges.*

Wright, *Circuit Judge:* In these mandamus proceedings,[1] petitioners request issuance of writs requiring that respondents take the necessary steps to have convened three-judge District Courts under 28 U.S.C. § 2284. They assert that in spite of the allegations, in the complaints filed below, of the unconstitutionality of 18 U.S.C. §§ 1461 and 1462 as amended in 1958, Pub.L. 85-796, §§1-2, 72 Stat. 962, and irreparable damage which would result from enforcement of these

[1] 28 U.S.C. § 1651.

statutes as to them, respondents have refused to comply with the procedures required by 28 U.S.C. § 2284 to have three-judge District Courts consider the applications for injunction against the Attorney General of the United States and his nominees.

In their complaints filed in the District Court, petitioners allege that they are distributors and publishers of books and magazines, and that the representatives of the United States "intend to and will commence and prosecute various criminal actions in the District Courts throughout the United States purportedly authorized under Title 18, United States Code, Sections 1461 and 1462, as amended. Such actions by defendants will necessarily involve plaintiffs in a multiplicity of legal proceedings; involve and threaten them with the destruction of their good-will and property; and exhaust their financial and physical resources and thus make it impossible for plaintiffs to adequately defend against the aforesaid multiple criminal prosecutions. Such conduct will seriously diminish the circulation of plaintiffs' books and writings, and plaintiffs will suffer substantial and irreparable loss and damage for which plaintiffs have no adequate remedy at law."

The particular part of the statutes on which the petitioners rely for the issuance of an injunction against their enforcement "purport[s] to permit the prosecution of alleged violators at either the place of mailing or at the place of delivery or at any other place through which material passes, thus allegedly authorizing arbitrary forum-picking by federal prosecutors and the institution of multiple prosecutions for identical material in districts far removed from the residences and places of business of alleged violators." This statutory

permission for forum-picking, according to petitioners, "constitutes an unlawful interference with and abridgement and denial of the freedom of the press, in violation of the First Amendment; deprives persons, including these plaintiffs, of their liberty and property without due process of law, in violation of the Fifth Amendment; and deprives persons of their rights to a fair trial in a criminal prosecution guaranteed by the provisions of the Sixth Amendment."

18 U.S.C. §§ 1461 and 1462 prohibit the mailing, importation and transportation of obscene matter. Before the 1958 amendment, § 1461 was upheld against constitutional attack based on First, Fifth, Ninth and Tenth Amendment grounds. *Roth v. United States,* 354 U.S. 476 (1957). Venue for the prosecution in *Roth* was the place where the material was mailed, the prior case of *United States v. Ross,* 10 Cir., 205 F.2d 619 (1953), having held, in spite of the "continuing offense" language in 18 U.S.C. § 3237, that venue under these statutes was proper only at the place of mailing.

It was to reverse the *Ross*-imposed limitation on venue under the obscenity statutes that Congress passed the 1958 amendment. In passing this amendment, the Congress rejected a Senate proposal which would have limited the extension of venue under §§ 1461 and 1462 to the place of delivery. The final form of the bill contained the broader language proposed by the House: "Whoever knowingly uses the mails * * *" Thus, as amended, venue under these statutes is proper, not only at the place of mailing and delivery, but in any district through which the allegedly obscene matter travels. See 1958 U. S. Code Cong. & Ad. News 4017. It is the

constitutionality of the amendment which is under attack in these proceedings.

The Government seeks dismissal of these applications for writs of mandamus on grounds that a long line of Supreme Court cases has affirmed the constitutionality of "continuing offense" venue provisions in criminal statutes[2]; that the constitutionality of the 1958 amendment to the obscenity statutes can be tested in the criminal proceedings which have already been brought in the districts of delivery of the allegedly obscene matter; and that the allegations of harassment by multiple prosecutions in venues permitted under the 1958 amendment are untrue.

The problem presented as to whether the convening of three-judge District Courts is required in these cases divides itself into three parts: (1) the presence or absence of a substantial constitutional question; (2) the necessity for injunctive relief; and (3) the presence or absence of a case or controversy. We shall consider these issues seriatim.

I

Since *Roth* has settled the constitutionality of the obscenity statutes prior to the 1958 amendment, we need only consider the effect of that amendment. Petitioners allege, with substantial support from the Supreme Court, that prosecutions involving possible collision with First Amendment rights are not subject to the routine consideration given prosecutions under

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[2]Citing *Armour Packing Co. v. United States*, 209 U.S. 56, 73-77 (1908) (transportation of goods at illegal freight rates); *United States v. Johnson*, 323 U.S. 273, 274-276 (1944) (using mails for wrongful sending of dentures); *United States v. Cores*, 356 U.S. 405, 408 (1958) (alien crewman remaining in United States beyond time permitted by conditional landing permit).

ordinary criminal statutes.[3] "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. * * * The separation of legitimate from illegitimate speech calls for more sensitive tools * * *." *Speiser v. Randall,* 357 U.S. 513, 525 (1958). Moreover, it is not clear that the standard to be applied to material challenged as obscene is a national one or one that may vary from district to district.[4] In this context, the question as to whether the prosecution may constitutionally be allowed a multiple choice of forum acquires added importance.

There can be no doubt that the purpose of the 1958 amendment was to provide the prosecution a multiple venue choice to facilitate successful prosecution. The General Counsel of the Post Office Department, which sponsored the amendment, advised the Congress that the need for reversing the *Ross* decision which limited venue under §§ 1461 and 1462 to the district of mailing arose from "the fact that it is sometimes difficult to obtain a conviction for the mailing of obscene matter in certain jurisdictions. In the Ross case, above, the defendant had mailed pictures of nude females in one

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[3]In *Smith v. California,* 361 U.S. 147 (1959), the Supreme Court reversed a conviction of a bookseller under a Los Angeles ordinance which did not contain the element of *scienter.* In so doing the Court stated:

> "* * * Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. * * *" *Id.* at 150-151.

[4]See the various opinions in *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

State for delivery in another State. In the judicial district where the pictures were mailed, the court held that the pictures were not obscene * * *." Letter to Chairman of House Judiciary Committee, 1958 U. S. Code Cong. & Ad. News 4014-4015.

While obscenity is without constitutional protection, "[a]ll ideas having even the slightest redeeming social importance" come within the First Amendment guaranty. *Roth v. United States, supra,* 354 U.S. at 484. The question in each case as to whether a particular publication is obscene is a mixed one of law and fact. The Supreme Court in *Roth* held that it was a question which should be submitted to the jury to be determined under proper instructions. 354 U.S. at 489-490. Under the circumstances, again the importance of venue is obvious. Where the prosecution is brought may very well determine whether the books and magazines are obscene or constitutionally protected.

While we do not, of course, intimate any opinion as to the constitutionality of the 1958 amendment, an attack on a statute which would permit the prosecution a multiple choice of venue in this protected area of First Amendment freedoms is not patently frivolous. Such choice could induce the publisher to engage in self-censorship and thus restrict the public's access to protected publications. "Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister,* 380 U.S. 479, 494 (1965).

We find that the complaints filed in the District Court raise a substantial question as to the constitutionalty of the 1958 amendment.

II

The traditional basis for injunctive relief is, of course, irreparable harm and inadequacy of legal remedies. *Beacon Theatres v. Westover,* 359 U.S. 500, 506-507 (1959). Ordinarily, in injunction proceedings seeking to restrain enforcement of an allegedly unconstitutional statute, once a substantial question of constitutionality is raised and the complaint "at least formally alleges a basis for equitable relief," a three-judge court is required. *Idlewild Liquor Corp. v. Epstein,* 370 U.S. 713, 715 (1962). Here the allegations in the complaints unquestionably outline a basis for equitable relief. For the purpose of determining whether three-judge courts are required, these allegations, unless obviously colorable, must be taken as true, and the answers of the Government addressed to three-judge courts. *Ibid.* See also *Schneider v. Rusk,* 372 U.S. 224 (1963). Compare *Pierre v. Jordan,* 9 Cir., 333 F.2d 951, 956-957 (1964), *cert. denied,* 379 U.S. 974 (1965).[5]

Petitioners allege that the multiplicity of legal proceedings which the Government intends to bring will destroy their businesses, exhaust their financial resources, and make it impossible to defend themselves. In argument and brief they point to the fact that they are already under indictment far from their homes and businesses, and cite other cases where a single publisher has been charged under the same statutes in several different places.[6] If these allegations can be supported by evidence, irreparable damage appears patent.

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[5]See Note, *The Three-Judge District Court: Scope and Procedure Under Section* 2281, 77 Harv. L. Rev. 299, 309 (1963).

[6]Petitioners' brief, at page 7, reads:

"* * * Thus, a Fresno publisher, who was vindicated in a proceeding on an indictment in Fresno, the place of mail-

The Government's suggestion that petitioners have an adequate remedy at law in the criminal proceedings now pending against them, while perhaps appropriate in cases outside the First Amendment area where a single prosecution is contemplated, is unavailing here. The Government has not even denied that it contemplates multiple prosecutions. In affidavits supporting its answer filed in the District Court in opposition to the applications for preliminary injunction, it is merely stated: "The Department of Justice has not taken any action with respect to plaintiffs which is intended to harass the plaintiffs or to abridge any freedoms to which they are entitled." Moreover, under some circumstances even a single "criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. * * * The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski v. Pfister, supra,* 380 U.S. at 486. Compare *Terrace v. Thompson,* 263 U.S. 197, 216 (1923).

III

The Government's argument that the applications for three-judge courts were properly denied because the litigation in the District Court did not present a case or controversy within the meaning of Article 3 of the

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ing (*U.S. v. Aday* Fresno, No. 34-45 N.D. Crim 1958) was, after the amendment to 38 [*sic*] U.S.C. §1461, indicted in Arizona (*U.S. v. Aday,* No. C-15596, Phoenix), Grand Rapids, Michigan. (*U.S. v. Aday,* Cr. No. 6615, Western District of Michigan, Southern Division), Honolulu (*U.S. v. Aday,* Cr. No. 11510, District of Hawaii), and Houston, Texas (*U.S. v. Aday,* Southern District of Texas, Houston Division, Criminal No. 65-H 80). * * *"

Constitution is predicated primarily on our opinion in *Lion Manufacturing Corporation v. Kennedy,* 117 U.S.App.D.C. 367, 330 F.2d 833 (1964). There, in an action to enjoin enforcement of the Slot Machine Act of 1951 as amended by the Gambling Devices Act of 1962, 15 U.S.C. §§ 1171-1178, we held that an application for a three-judge court was properly denied, the District Court being without jurisdiction since the complaint stated no case or controversy. In *Lion,* "[i]t is nowhere alleged that the Attorney General, or anyone acting for him, has taken steps to initiate criminal prosecutions against plaintiffs or to require registration, nor that threats to this effect have been directed to plaintiffs." 117 U.S.App.D.C. at 372, 330 F.2d at 838. The factual difference between *Lion* and these cases is manifest.[7] Moreover, *Lion* is not concerned with the protected area of First Amendment freedoms. Where the plaintiff complains of chills and threats in the protected First Amendment area, a court is more disposed to find that he is presenting a real and not an abstract controversy.

We conclude that there is indeed presented a case or controversy within the intendment of Article 3 in each of these cases, and that under 28 U.S.C. § 2284 three-judge District Courts are required to hear them.

IV

We come at last to the propriety of review by this court of the district judges' refusal to convene three-judge courts. The fact that a Court of Appeals has no jurisdiction to hear an appeal on the merits in a

[7]For a case clearly pointing up the difference between a justiciable controversy and a request for an advisory opinion, see *United Public Workers v. Mitchell,* 330 U.S. 75, 86-94 (1947).

three-judge case, 28 U.S.C. § 1253, was for a time thought to be inconsistent with any review by that court of a district judge's failure to convene a three-judge court. In *Idlewild Liquor Corp. v. Epstein, supra,* however, the Supreme Court put an end to that misconception, and denied that "a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled." 370 U.S. at 716.

Three-judge District Courts should have been convened to hear these cases. No final action will now be taken, however, on the petitions for writs of mandamus, as we assume that the respondents will take appropriate action in requesting three-judge courts pursuant to § 2284(1). See *Svejkovsky v. Tamm,* 117 U.S.App.D.C. 114, 326 F.2d 657 (1963).

An appropriate order will issue in each case.

Fahy, *Circuit Judge,* concurs in the result and in Part IV of this opinion.

APPENDIX C.

Constitutional Provisions, Statutes, and Rules Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .".

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .".

3. The provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The provisions of Article I, §1 of the United States Constitution are:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

5. The pertinent provisions of Article I, §8 of the United States Constitution are:

"The Congress Shall Have Power . . .

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

"To establish Post Offices and post Roads;

* * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. * * *

6. The pertinent provisions of Article III, §2 of the United States Constitution are:

* * *

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

7. The 1958 amendments to 18 U.S.C. §§1461 and 1462 [Pub.L.85-796, §§1-2, 72 Stat.962] are:

AN ACT

To amend sections 1461 and 1462 of title 18 of the United States Code.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the eighth paragraph of section 1461 of title 18 of the United States Code is amended to read as follows: "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Sec. 2. (a) The first paragraph of section 1462 of title 18 of the United States Code is amended to read as follows:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commarce—".

(b) That paragraph of such section 1462 which begins with the words "Whoever knowingly takes" is amended to read as follows: "Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—".

(c) The last paragraph of such section 1462 is amended to read as follows: "Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

Approved August 28, 1958.

8. The entire provisions of 18 U.S.C. 1461, as amended (June 25, 1948, c. 645, 62 Stat. 768; June 28, 1955, c. 190, §§ 1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, §1, 72 Stat. 962), are:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

"Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

"Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

"Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of any-

thing declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction, thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

9. The entire provisions of 18 U.S.C. 1462, as amended (June 25, 1948, c. 645, 62 Stat. 758; May 27, 1950, c. 214 §1, 64 Stat. 194; August 28, 1958, Pub. L. 85-796, § 2, 72 Stat. 962), are:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

"Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000, or imprisoned not more than ten years, or both, for each such offense thereafter."

10. The provisions of 18 U.S.C. §3237(a) [Act of June 25, 1948, Chap. 645, 62 Stat. 826; Pub.L. 85-595, 72 Stat. 512] are:

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed:

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any

district from, through, or into which such commerce or mail matter moves."

11. The provisions of Rule 18 of the Federal Rules of Criminal Procedure provide:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

12. The provisions of Rule 21(b) of the Federal Rules of Criminal Procedure provide:

"For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district."

APPENDIX D.

Stipulation of Facts.

United States District Court, for the District of Columbia.

Reed Enterprises, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Action No. 1744-65.

Milton Luros, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Action No. 2562-65.

Sanford Elestel Aday, et al., Plaintiffs, v. Ramsey Clark, et al., Defendants. Civil Action No. 3009-65.

STIPULATION

The parties hereto, by their counsel, stipulate and agree as follows:

I.

Civil Action No. 3009-65

1. The plaintiff West Coast News Company, Inc. is a California corporation, with its principal office in Fresno, California. The plaintiffs Sanford Elestel Aday and Wallace De Ortega Maxey both reside and work in Fresno, California.

2. The plaintiff Sanford Elestel Aday was indicted on April 2, 1958, in the United States District Court for the Southern District of California, Northern Division (Fresno) for three alleged violations of Title 18, United States Code, Section 1461. Eleven pocketbooks were involved in the prosecution, the titles of which were: "Turbulent Daughters," "Taxi Dancers," "The Black Night," "Tainted Wife," "Dark Quarters," "Rene," "Rambling Maids," "Violent Surrender," "The Strange Three," "Stairways to Sin," and "Karla." The government withdrew eight of these titles prior to the

submission of the case to the jury. The three pocketbooks submitted to the jury were "Rambling Maids," "Strange Three," and "Turbulent Daughters." The jury returned a not guilty verdict on "Rambling Maids" and deadlocked on "Strange Three" and "Turbulent Daughters." The entire indictment against plaintiff Aday was subsequently dismissed. With the exception of the proceedings mentioned in Paragraph 3 of this stipulation concerning the book "Black Night," there have been no other federal criminal proceedings against these plaintiffs at any time relating to any of the publications mentioned in this paragraph.

3. Plaintiffs West Coast News Company, Aday and Maxey were indicted for violations of Title 18, United States Code, Section 1462 in Grand Rapids, Michigan, on May 24, 1960; in Phoenix, Arizona, on April 26, 1960; and in Honolulu, Hawaii, on October 12, 1960. The titles involved in each of these cases were as follows:

a. Grand Rapids—"Sex Life of a Cop," "Decisive Years," "The Black Night," "Witch Finder," "Love Princess," "Never Enough," "I am a Lesbian," and "Desperate Moments";

b. Phoenix—"Sex Life of a Cop";

c. Honolulu—"Sex Life of a Cop," "Decisive Years," and "Each Won Two."

4. The case against plaintiffs in Grand Rapids, Michigan, proceeded to trial on October 28, 1963, but the proceedings in Honolulu and Phoenix were dismissed by the government prior to trial and after the conviction in Grand Rapids.

5. The plaintiffs, Maxey, Aday, and West Coast News Company, were convicted in Grand Rapids, Mich-

igan, on December 12, 1963, and were sentenced on December 30, 1963. Their convictions were on five of the eighteen counts charged in the indictment. The indictment charged that eight books in the shipments were obscene, but the jury disagreed among themselves as to all but "Sex Life of a Cop." Plaintiff West Coast News Company was fined a total of $25,000; Plaintiff Aday was fined a total of $25,000 and sentenced to a total prison term of 25 years, subject to the terms of Title 18, United States Code, Section 4208(a)(2); and plaintiff Maxey was fined a total of $19,000 and sentenced to a total prison term of fifteen years, also subject to Title 18, United States Code, Section 4208(a)(2). One of the defenses raised in that proceeding and overruled by the district court was the unconstitutionality of the venue provisions of the 1958 amendments to the federal obscenity statutes.

6. On March 22, 1966, the Grand Rapids conviction was sustained by the Sixth Circuit Court of Appeals but the case was remanded for reconsideration of the sentence. *United States v. West Coast News Company,* 357 F. 2d 855. In its opinion, the Circuit Court rejected plaintiffs' challenge to the constitutionality of the venue provisions embodied in the 1958 amendments to the federal obscenity statutes. On April 6, 1966, the District Court resentenced Aday to ten years imprisonment and Maxey to five years imprisonment, again subject to the terms of Title 18, United States Code, Section 4208(a)(2). The court left in effect the fines which it had initially imposed. The plaintiffs, on May 18, 1966, filed a petition for a writ of certiorari to the United States Supreme Court which is still pending.

7. On March 26, 1965, plaintiffs Aday, Maxey, and West Coast News Company were indicted on ten counts in Houston, Texas, for allegedly shipping quantities of five different paperback books from other states into the Southern District of Texas in violation of the federal obscenity statutes. The five titles involved were: "The Awakening of Cindy," "The Girls of Club Sappho," "The Women were Willing," "The Swingers," and "Twisted Passions." The transportations charged occurred between November 14, 1962 and March 2, 1965. All ten of these alleged transportations occurred after the return, on May 24, 1960, of the indictment in Grand Rapids, Michigan, and six of the transportations occurred after December 12, 1963, the date of the Grand Rapids conviction.

8. There have been no other federal criminal proceedings against these plaintiffs at any time relating to any of the publications mentioned in Paragraphs 2, 3, and 7 of this stipulation or relating to any other of their publications.

9. The books named in the Honolulu, Grand Rapids and Houston indictments were transported into the districts wherein the indictments were returned in the regular course of plaintiffs' business. In each case the books were then purchased from local retail outlets by agents of the Federal Bureau of Investigation.

II.

Civil Action No. 1744-65

10. The plaintiffs, Reed Enterprises and Corinth Publications are California corporations with their principal place of business in San Diego, California. The other plaintiffs in Civil Action No. 1744-65 reside

and work in or around the following locations: Richard A. Yerxa in San Diego, California; William L. Hamling in Palm Springs, California.

11. On September 10, 1965, in Houston, Texas, the plaintiffs in Civil Action No. 1744-65 were indicted on twenty-six counts for allegedly shipping quantities of seven different paperback books from other states into the Southern District of Texas in violation of the federal obscenity statutes. In addition to these plaintiffs, six others were also named in the same indictment: Stephen A. Keegan of San Diego, California; Donald M. Partrick of El Cajon, California; Shirley R. Wright of La Mesa, California; and Walter H. Lonsdale of Gardena, California; Howard E. Stephens and Stephens Printing Corporation of Sandusky, Ohio. The titles of the books named in the Houston indictment were: "Orgy Club," "Sin Summer," "Shame Hunger," "Temple of Shame," "Virgins, Inc.," "Passion Carousel," and "Swap Sect." Six of the books were alleged in the indictment to have been transported from Sandusky, Ohio, to the Southern District of Texas. The seventh book was alleged to have been transported from Los Angeles, California, to the Southern District of Texas.

12. The seven books named in the Houston indictment were transported into the Southern District of Texas in the regular course of plaintiffs' business operations and were then purchased from local retail outlets by agents of the Federal Bureau of Investigation.

13. On September 2, 1966, following a trial of eight weeks, the jury reported itself deadlocked and was dismissed. All of the individual defendants and their five attorneys were present in the courtroom in

Houston, Texas, throughout the trial. On February 17, 1967, United States District Judge Joe Ingraham denied defendants' motions for judgments of acquittal. The case has been scheduled for retrial commencing on May 15, 1967.

14. There have been no other federal criminal proceedings against these plaintiffs relating to any of the publications mentioned in Paragraph 11 of this stipulation or relating to any other of their publications.

III.

Civil Action No. 2562-65

15. The plaintiffs, Sun Era, Inc., American Art Agency, Inc., Parliament News, Inc., and London Press, Inc., are all California corporations with their principal office in North Hollywood, California. The plaintiffs, Milton Luros, Beatrice B. Luros, Stanley E. Sohler, Melvin Friedman, Elmer A. Batters, Bernard J. Abramson, Harold Straubing, Paul Wisner, Sam Merwin, Jr., and Victor J. Banis, all reside and work in on around Los Angeles, California. The plaintiff Richard E. Geis resides in or around Portland, Oregon.

16. On March 24, 1965, in Fort Dodge, Iowa, these plaintiffs were indicted on twenty-five counts for allegedly shipping interstate and mailing quantities of six different paperback books and twenty-five different magazines into the Northern District of Iowa in violation of the federal obscenity statutes. *United States v. Luros*, No. 65-Cr-3007-W, N.D. Iowa. In addition to the plaintiffs in Civil Action No. 2562-65, Wayne Cantrell Vance was also named as a defendant in the Iowa indictment. The titles of the paperback books involved in the indictment were: "The Affairs of Gloria,"

"Lesbian Alley," "Pleasure House," "Two Women in Love," "The Three Way Apartment," and "Lesbian Sin Song." The titles and issues of the magazines involved in the indictment were: "Teenage Nudist," Vol. 1, No. 1, "Nudist Photo Field Trip," No. 6, "Urban Nudist," Vol. 1, Nos. 8, 9, 10, and 11, "Sun Era," Vol. 1, Nos. 8 and 10 and Vol. 2, Nos. 2 and 4, "Nudist Colorama," Nos. 2 and 3, "Popular Nudism," Vol. 1, Nos. 3 and 4, "Nudist Week," "Cocktail," Vol. 4, No. 3, "Affair," Vol. 1, No. 3, "Trojan," Vol. 3, No. 1, "Late Date," Vol. 2, No. 2, "Showoff," No. 2, "Matinee," Vol. 2, No. 1, "Sensation," Vol. 1, No. 3, "Body Shop," Vol. 1, No. 4, "Late Show", Vol. 2, No. 1, "Snap," Vol. 4, No. 2, and "Tip Top," Vol. 3, No. 6.

17. The indictment alleged the shipment into the Northern District of Iowa by common carrier of 50 copies of "Nudist Colorama," No. 3, 50 copies of "Nudist Week," 15 copies of "Cocktail," Vol. 4, No. 3, 15 copies of "Affair," Vol. 1, No. 3, 15 copies of "Trojan," Vol. 3, No. 1, 15 copies of "Late Date," Vol. 2, No. 2, 10 copies of "Showoff," No. 2, and 15 copies of "Matinee," Vol. 2, No. 1. The remaining titles named in the indictment were alleged to have been mailed into the Northern District of Iowa. The evidence at trial showed that these mailings were made in response to test orders placed by postmasters in the Northern District of Iowa in accordance with instructions given by two postal inspectors. In response to the test orders, one copy of "Teenage Nudist," Vol. 1, No. 1, one copy of "Nudist Photo Field Trip," No. 6, one copy of "Urban Nudist," Vol. 1, No. 9, one copy of "Sun Era," Vol. 1, No. 8, one copy of "Urban Nudist," Vol. 1, No. 10, one copy of "Nudist Colorama Number

2," one copy of "Sun Era," Vol. 1, No. 10, one copy of "Urban Nudist," Vol. 1, No. 11, one copy of "Sun Era," Vol. 2, No. 2 (Number 14), one copy of "Popular Nudism," Vol. 1, No. 3, one copy of "Popular Nudism," Vol. 1, No. 4, one copy of "Sensation," Vol. 1, No. 3, one copy of "Body Shop," Vol. 1, No, 4, one copy of "Late Show," Vol. 2, No. 1, one copy of "Snap," Vol. 4, No. 2, one copy of "Tip Top," Vol. 3, No. 6, and one copy of "Lesbian Sin Song" were received by postmasters in the Northern District of Iowa. Following their receipt, these materials were sent to a postal inspector in Los Angeles, California. In response to other test orders, one copy of "Sun Era," Vol. 2, No. 4 (Number 16), one copy of "Lesbian Alley," one copy of "The Three Way Apartment" and one copy of "The Affairs of Gloria" were received by postmasters in the Northern District of Iowa. Following their receipt these materials were sent to a postal inspector in Fort Dodge, Iowa. In response to another test order, one copy of "Pleasure House," was received by a postmaster in the Northern District of Iowa. Following its receipt, this material was sent to a postal inspector in St. Louis, Missouri. In response to still another test order, one copy of "Two Women in Love" was received directly by a postal inspector at Sioux City, Iowa.

18. During the course of the trial in *United States v. Luros,* subpoenaed invoices of Parliament News, Inc. were introduced into evidence. These invoices showed that during the period covered by the indictment, December 30, 1963, through March 24, 1965, Parliament News, Inc. shipped the following quantities of materials named in the indictment into Sioux City in the

Northern District of Iowa in the ordinary course of its business.

Titles	Number of Copies
Teenage Nudist, Vol. 1, No. 1	50
Urban Nudist, Vol. 1, No. 8	50
Urban Nudist, Vol. 1, No. 9	50
Urban Nudist, Vol. 1, No. 10	50
Urban Nudist, Vol. 1, No. 11	75
Nudist Colorama, No. 2	75
Nudist Colorama, No. 3	50
Nudist Photo Field Trip, No. 6	75
Sun Era, Vol. 1, No. 8	50
Sun Era, Vol. 1, No. 10	75
Sun Era, Vol. 2, No. 2 (No. 14)	50
Sun Era, Vol. 2, No. 4 (No. 16)	50
Popular Nudism, Vol. 1, No. 3	50
Popular Nudism, Vol. 1, No. 4	50
Nudist Week	50
Snap, Vol. 4, No. 2	15
Late Show, Vol. 2, No. 1	25
Body Shop, Vol. 1, No. 4	25
Affair, Vol. 1, No. 3	15
Trojan, Vol. 3, No. 1	15
Late Date, Vol. 2, No. 2	15
Showoff, No. 2	10
Matinee, Vol. 2, No. 1	15
Sensation, Vol. 1, No. 3	15

The foregoing figures do not reflect distributions made into the Northern District of Iowa by Sun Era, Inc. and American Art Agency, Inc.

19. The following quantities of materials named in the *Luros* indictment were mailed into the Northern District of Iowa by Parliament News, Inc., Sun Era,

Inc. or American Art Agency, Inc. in response to test orders or subscriptions sent by postmasters in Iowa.

Titles	Number of Copies
Teenage Nudist, Vol. 1, No. 1	1
Nudist Photo Field Trip, No. 6	1
Urban Nudist, Vol. 1, No. 8	1
Urban Nudist, Vol. 1, No. 9	1
Urban Nudist, Vol. 1, No. 10	1
Urban Nudist, Vol. 1, No. 11	1
San Era, Vol. 1, No. 8	1
Sun Era, Vol. 1, No. 10	1
Sun Era, Vol. 2, No. 2 (No. 14)	1
Sun Era, Vol. 2, No. 4 (No. 16)	1
Nudist Colorama, No. 2	1
Popular Nudism, Vol. 1, No. 3	1
Popular Nudism, Vol. 1, No. 4	1
Sensation, Vol. 1, No. 3	1
Body Shop, Vol. 1, No. 4	1
Late Show, Vol. 2, No. 1	1
Snap, Vol. 4, No. 2	1
Tip Top, Vol. 3, No. 6	1
Lesbian Sin Song	2
Two Women in Love	3
Pleasure House	2
Lesbian Alley	2
The Three Way Apartment	2
The Affairs of Gloria	2

20. Trial began in the Northern District of Iowa on October 18, 1965. Prior to the submission of the case to the jury, Judge William Hanson dismissed the conspiracy count and counts 9, 15, 16, 17, 18, and 19, thereby withdrawing from the jury's consideration the following titles: "Cocktail," Vol. 4, No. 3, "Affair,"

Vol. 1, No. 3, "Trojan," Vol. 3, No. 1, "Late Date," Vol. 2, No. 2, "Showoff," No. 2, "Matinee," Vol. 2, No. 1, "Sensation," Vol. 1, No. 3 "Body Shop," Vol. 1, No. 4, "Late Show," Vol. 2, No. 1, "Snap," Vol. 4, No. 2, "Tip Top," Vol. 3, No. 6 and "Sun Era," Vol. 2, No. 4 (No. 16). In all, eighteen of the original twenty-five counts were submitted to the jury and on January 14, 1966, the jury found all parties guilty on each of these eighteen counts. All six paperback books were determined by the jury to be obscene. The magazines determined by the jury to be obscene were: "Teenage Nudist," Vol, 1, No. 1, "Nudist Photo Field Trip," No. 6, "Urban Nudist," Vol. 1, Nos. 8, 9, 10, and 11, "Sun Era," Vol. 1, Nos. 8 and 10, Vol. 2, No. 2 (No. 14), "Nudist Colorama," Nos. 2 and 3, "Popular Nudism," Vol. 1, Nos. 3 and 4, and "Nudist Week." Motions for judgment of acquittal were later granted as to all the individual defendants except Milton Luros on the ground that the government had failed to offer adequate proof satisfying the element of scienter. Motions for judgment of acquittal were denied as to Milton Luros and the corporate defendants. See, 260 F. Supp. 697. On January 6, 1967, Milton Luros was sentenced to five years in the federal penitentiary and fined $25,000. Parliament News, Inc. and London Press, Inc. were each fined $25,000 and Sun Era, Inc., and American Art Agency, Inc. each received fines of $12,000. Notice of appeal has been filed.

21. There have been no other federal criminal proceedings against these plaintiffs at any time relating to the publications mentioned in Paragraph 16 of this stipulation or relating to any other of their publications.

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